IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BRANDON APELA AFOA, an individual, Respondent, v. PORT OF SEATTLE, a Local Government Entity in the State of Washington, Petitioner.	)	No. 85784-9 En Banc Filed January 31, 2013

WIGGINS, J. — Should we extend to the Port of Seattle (Port), which owns and operates Seattle-Tacoma International Airport (Sea-Tac Airport), the principles of liability imposed on other entities that control the common area of a multiemployer workplace? Brandon Afoa was paralyzed in an accident while he was working at Sea-Tac Airport and seeks to recover from the Port on three theories we have applied in other multiemployer workplace cases: as a business invitee; for breach of safety regulations under the Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW; and the duty of a general contractor to maintain a safe common area for any

employee of subcontractors. We conclude that the same principles that apply to other multiemployer workplaces apply to Sea-Tac and that a jury could find the Port liable under any of these three theories. We affirm the Court of Appeals, which reversed the trial court's summary judgment dismissing Afoa's claims, and remand for further proceedings.

FACTS

Brandon Afoa was severely injured while working at Sea-Tac Airport. He was driving a powered industrial vehicle called a "tug" or "pushback" that moves airplanes to and from passenger gates. As he drove the tug/pushback toward Gate S-16, he lost control of the vehicle and yelled for help. He crashed into a "K-loader," a large piece of loading equipment that fell on him causing severe injuries. The parties dispute the cause of the accident.

Afoa filed suit against the Port in King County Superior Court, alleging that the Port failed to maintain safe premises and violated common law and statutory duties to maintain a safe workplace. The Port moved for summary judgment, arguing it had no duty to Afoa because Afoa was not the Port's "employee."

Indeed, the Port and Afoa do not enjoy a direct employer-employee relationship. Afoa works for Evergreen Aviation Ground Logistics Enterprises Inc. (EAGLE), which contracts with airlines to provide ground services such as loading and unloading. The Port does not employ EAGLE or contract for its

services, but EAGLE nevertheless must obtain a license from the Port before it can work on the premises.

Although the Port does not employ Afoa or EAGLE, Afoa alleges that the Port controls the manner in which he performs his work at Sea-Tac Airport. First, he claims the Port retains control over the "Airfield Area" (where the accident allegedly took place) in its lease agreement with the airlines, which grants the airlines use of the Airfield Area "subject at all times to the exclusive control and management by the Port." Clerk's Papers (CP) at 274. Second, Afoa claims the Port retains control through its license agreement with EAGLE, which requires EAGLE to abide by all Port rules and regulations and allows the Port to inspect EAGLE's work. The agreement also disclaims liability for accidents and equipment malfunctions. Finally, Afoa claims the Port retains control over EAGLE by the Port's conduct. He specifically claims that the Port continuously controls and supervises the actions of EAGLE and its employees and that the Port previously asserted control over tug/pushback brake maintenance following an incident that was similar to, and three months before, Afoa's accident.

The Port moved for summary judgment, arguing that none of Afoa's claims were viable because neither Afoa nor EAGLE was the Port's employee, but instead EAGLE was a licensee and the Port a licensor.

The trial court granted the Port's summary judgment motion, dismissing

Afoa's claims. The Court of Appeals reversed, holding that all of Afoa's claims were viable and that summary judgment was inappropriate because all of Afoa's claims hinged on genuine issues of material fact. *Afoa v. Port of Seattle*, 160 Wn. App. 234, 247 P.3d 482 (2011). We granted review to decide whether summary judgment was appropriate and to examine these important issues of workplace safety. *Afoa v. Port of Seattle*, 171 Wn.2d 1031, 257 P.3d 664 (2011).

STANDARD OF REVIEW

We review summary judgment motions de novo, engaging in the same inquiry as the trial court. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* We consider all disputed facts in the light most favorable to the nonmoving party, and summary judgment is appropriate only if reasonable minds could reach but one conclusion. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). Finally, summary judgment is inappropriate where the existence of a legal duty depends on disputed material facts. *Sjogren v. Props. of Pac. Nw., LLC*, 118 Wn. App. 144, 148, 75 P.3d 592 (2003).

ANALYSIS

We hold that there are genuine issues of material fact precluding

summary judgment on all three of Afoa's claims against the Port. We analyze each claim in turn—premises liability, Afoa's statutory claim under WISHA, chapter 49.17 RCW, and the duty of certain parties in control of a common work area to provide adequate safety precautions. For all three claims, the Port potentially owed a duty to Afoa, and genuine factual issues preclude summary judgment. Accordingly, we affirm the Court of Appeals on all three issues.

I. Afoa's premises liability claim is potentially viable. Afoa is a business invitee and there are triable issues of fact whether the Port breached its corresponding duty to Afoa.

Afoa and the Port dispute Afoa's status and standard of care under Afoa's theory of premises liability. Under common law premises liability, a landowner owes differing duties to entrants onto land depending on the entrant's status as a trespasser, a licensee, or an invitee. *Iwai v. State*, 129 Wn.2d 84, 90-91, 915 P.2d 1089 (1996). We hold that Afoa is a business invitee. We also affirm the Court of Appeals' reversal of summary judgment because there are genuine issues of material fact on this claim.

A "business invitee" is a person who is "'invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.'" *Younce v. Ferguson,* 106 Wn.2d 658, 667, 724 P.2d 991 (1986) (quoting Restatement (Second) of Torts § 332(3) (1965)). An invitation can be either express or implied permission gathered from the words

or conduct of the landowner. *See* Restatement (Second) of Torts § 332 cmt. c.

In contrast, a licensee is "'a person who is privileged to enter or remain on land only by virtue of the possessor's consent.'" *Younce*, 106 Wn.2d at 667 (quoting Restatement (Second) of Torts § 330). This includes social guests and others invited onto the land who do not meet the legal definition of an invitee. *Id.*

Our premises liability analysis cannot begin and end with the fact that the Port has labeled its contract with Afoa's employer EAGLE as a "license." Instead, we must look at the substance of the relationship to determine Afoa's status.

Afoa was plainly a business invitee because he was on the premises for a purpose connected to business dealings with the Port. There is simply no genuine dispute in the record on this point. The Port is in the business of running an airport, and Afoa was doing airport work. Indeed, he was doing work (loading and unloading airplanes) without which Sea-Tac Airport could not operate. Afoa was unquestionably on the premises for a purpose connected to business, so he is a business invitee. On this record, no reasonable jury could find otherwise.

The Port's two arguments to the contrary are unpersuasive. First, the Port claims it did not "invite" Afoa onto the premises, so he cannot be a business invitee. This argument is flawed because the Port confuses the

common law term of art with social convention. At common law, an invitation can consist of any words or conduct "which justifies others in believing that the possessor desires them to enter the land . . . ." Restatement (Second) of Torts § 332 cmts. b & c. Here, the Port licensed EAGLE to enter the premises to perform specific tasks, expressly contemplating that EAGLE's employees would perform those tasks. This is the essence of an invitation. The Port licensed EAGLE to contract with airlines knowing that EAGLE's work would take place on the premises. The Port's conduct justifies EAGLE in thinking its entry was desired, so the Port's claim that it did not invite EAGLE onto the premises is unavailing. Furthermore, EAGLE can be physically present at Sea-Tac Airport only in the form of its employees, so its employees are clearly within the scope of the invitation.

Second, the Port argues that Afoa is not an invitee because there was no "'mutuality of interest.'" Pet. for Discretionary Review at 18 (quoting *Thompson v. Katzer*, 86 Wn. App. 280, 286-87, 936 P.2d 421 (1997) (quoting *Enersen v. Anderson*, 55 Wn.2d 486, 488, 348 P.2d 401 (1960))). *Thompson* considered "mutuality of interest" as a factor in distinguishing between a business invitee and a social guest; here, in contrast, it is clear that Afoa was not a social guest. In any event, the record in this case plainly establishes mutuality of interest. The Port unquestionably has an interest in having work done by contractors like EAGLE: The Port operates a complex commercial

enterprise from which it substantially benefits, and contractors like EAGLE are part of that enterprise. The Port's second argument also fails.

As a matter of law, Afoa is a business invitee.

Having established this, we further conclude that there are genuine issues of material fact about whether the Port breached its duty to Afoa. Because Afoa was an invitee, the Port owed him a duty to prevent "harm caused by an open and obvious danger" if it "should have anticipated the harm, despite the open and obvious nature of the danger." *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 126, 52 P.3d 472 (2002). Afoa presents record evidence of such a danger; he claims there was clutter in his work area—in particular the broken-down K-loader that fell on him. Afoa submitted an aerial photograph and declaration suggesting that his injury resulted from this clutter. The Port did not rebut this evidence, so there is a genuine issue for the fact-finder about whether the Port breached its premises liability duty. Thus, we affirm the Court of Appeals' reversal of summary judgment.

II. Afoa has a potentially viable WISHA claim, and there are triable issues of fact regarding that claim.

Turning to Afoa's claim that the Port had a statutory duty to comply with WISHA regulations, we hold that the Port may indeed have had a duty under WISHA, and again factual issues preclude summary judgment. Accordingly, we affirm the Court of Appeals.

A. Jobsite owners such as the Port have a statutory duty to prevent WISHA violations if they retain control over work done on a jobsite.

Our legislature passed WISHA in 1973 to ensure worker safety and supplement the federal Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651-678. *See* ch. 49.17 RCW; *SuperValu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 425, 144 P.3d 1160 (2006). OSHA requires states to comply with its rules or else enact safe workplace standards at least as effective as OSHA in ensuring worker safety. 29 U.S.C. § 667(c)(2); *SuperValu*, 158 Wn.2d at 425. In addition, our constitution requires the legislature to "pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health." Wash. Const. art. II, § 35.

WISHA directs our Department of Labor and Industries to promulgate regulations that equal or exceed standards promulgated under OSHA. RCW 49.17.010, .040. WISHA's purpose is to assure "safe and healthful working conditions for every man and woman working in the state of Washington," and to "create, maintain, continue, and enhance the industrial safety and health program of the state." RCW 49.17.010.

Under WISHA, and in particular RCW 49.17.060, employers must comply with two distinct duties:

> Each employer:
>
> (1) Shall furnish to each of his or her employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his or her employees: PROVIDED, That no citation or order assessing a penalty shall be

> issued to any employer solely under the authority of this subsection except where no applicable rule or regulation has been adopted by the department covering the unsafe or unhealthful condition of employment at the workplace; and
>
> (2) Shall comply with the rules, regulations, and orders promulgated under this chapter.

RCW 49.17.060.[1]

These two distinct duties arise from RCW 49.17.060's two subsections. *See Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 671, 709 P.2d 774 (1985). Subsection (1) creates a "general duty" to maintain a workplace free from recognized hazards; this duty runs only from an employer to its employees. *Id.*

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[1] WISHA defines "employer" and "employee" broadly:

> The term "employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons and includes the state, counties, cities, and all municipal corporations, public corporations, political subdivisions of the state, and charitable organizations: PROVIDED, That any person, partnership, or business entity not having employees, and who is covered by the industrial insurance act shall be considered both an employer and an employee.

RCW 49.17.020(4).

> The term "employee" means an employee of an employer who is employed in the business of his or her employer whether by way of manual labor or otherwise and every person in this state who is engaged in the employment of or who is working under an independent contract the essence of which is his or her personal labor for an employer under this chapter whether by way of manual labor or otherwise.

RCW 49.17.020(5).

Subsection (2), on the other hand, creates a "specific duty" for employers to comply with WISHA regulations. *Id.* Unlike the general duty, the specific duty runs to *any* employee who may be harmed by the employer's violation of the safety rules. *Id; see also Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 460, 788 P.2d 545 (1990). We adopted this rule in *Goucher* and *Stute*, relying on the Sixth Circuit Court of Appeals' decision in *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799 (6th Cir. 1984). That case interpreted the parallel clause in OSHA as extending the specific duty to all employees on the work site who may be affected by work safety violations, irrespective of any employer-employee relationship. *Id.* at 804-05.

But even the specific duty does not create per se liability for anyone deemed an "employer." In *Kamla*, we held that although general contractors and similar employers *always* have a duty to comply with WISHA regulations, the person or entity that owns the jobsite is not per se liable for WISHA violations. *Kamla*, 147 Wn.2d at 125. Rather, jobsite owners have a duty to comply with WISHA only if they retain control over the manner in which contractors complete their work. *Id.* This rule recognizes the reality that not all jobsite owners are similarly knowledgeable about safety standards within a given trade. *Id.* at 124.

Our holding in *Kamla* is consistent with the federal "multi-employer workplace rule." *See* Amicus Curiae Br. by Wash. State Dep't of Labor &

Indus. at 7. Under that rule, an employer who controls or creates a workplace safety hazard may be liable under OSHA even if the injured employees work only for a different employer. *See Martinez Melgoza & Assocs. v. Dep't of Labor & Indus.*, 125 Wn. App. 843, 848-49, 106 P.3d 776 (2005) (citing OSHA cases). And certainly, as a matter of federal law, WISHA protections must equal or exceed OSHA standards. 29 U.S.C. § 667(c)(2); *SuperValu*, 158 Wn.2d at 425.

In sum, it is settled law that jobsite owners have a specific duty to comply with WISHA regulations if they retain control over the manner and instrumentalities of work being done on the jobsite. Further, this duty extends to all workers on the jobsite that may be harmed by WISHA violations.

B. Contrary to the Port's assertions, a jobsite owner's specific duty does not depend on the existence of a direct employment relationship.

Turning to the specific issue presented by this case, the Port argues that it owes Afoa no duty to comply with WISHA regulations because its relationship with EAGLE and Afoa is not that of an employer and employee. Instead, the Port claims it is only a licensor and EAGLE is a licensee.

We reject the Port's argument, which is inconsistent with our holdings in *Goucher* and *Stute*. As we made clear in those cases, the specific duty to prevent WISHA violations does not run only to the principal's employees, but to all workers on the work site who may be harmed by WISHA violations. *Goucher*, 104 Wn.2d at 671; *Stute*, 114 Wn.2d at 460. No employer-employee

relationship is required, so it makes no difference if the Port labels itself a licensor and EAGLE a licensee.

In addition, the express language of WISHA undermines the Port's argument. Subsection (2) imposes the specific duty on "employers," which is defined broadly. *See* RCW 49.17.020(4). The Port easily falls within this definition. Likewise, Afoa easily falls within the definition of an "employee." *See* RCW 49.17.020(5). Thus, even if Afoa is not *the Port's* employee, the Port is an "employer" and Afoa is an "employee" under the statute. That is all WISHA requires for a specific duty to arise. *See* RCW 49.17.060(2).

We reaffirm *Goucher* and *Stute* and hold that WISHA's specific duty does not require a direct employment relationship. To read the statute in any other way would contravene both federal law and WISHA's clearly articulated

policy of protecting workplace safety. *See* RCW 49.17.010. An employee's WISHA claim is not defeated as a matter of law merely because that employee is labeled a "licensee."

The dissent argues that prior to this decision "there was no broad rule applying to all situations where a landowner with employees on the property must comply with specific duties to another employer's employees." Dissent at 18. This decision does not establish any "broad rule applying to all situations." We hold only that jobsite owners must comply with WISHA regulations if they retain control over the manner and instrumentalities of work done at the jobsite.

The dissent expresses concern that WISHA duties should be limited to "the employment situation," either direct employment or employer-subcontractor relationships. *Id*. We have not previously so limited WISHA duties. Indeed, in our seminal decision in *Goucher*, we held that a landowner owed WISHA duties to a truck driver making a delivery to the landowner. 104 Wn.2d at 673. The Port operates a major airport facility, is responsible for its own employees, and allows controlled access to thousands of employees of other employers. Under these circumstances, the Port is closely analogous to a general contractor.

C. There are genuine issues of material fact whether the Port retained sufficient control over EAGLE and Afoa that it took on a duty to prevent WISHA violations.

The extent of the Port's control over EAGLE and Afoa is a genuine

dispute over a material fact. On the summary judgment record, some facts suggest the Port retained very little control: the Port's licensing agreement disclaims any liability for EAGLE's equipment and states that all equipment is the sole responsibility of EAGLE. On the other hand, some facts suggest the Port retained substantial control. For example, the Port retains "exclusive control" over the "Airfield Area" where the accident may have taken place. CP at 274. In addition, three months before Afoa's accident, the Port responded to a similar tug/pushback brake failure incident by suspending a driver's license, requesting an "emphasis briefing" on the importance of vehicle inspections, and requiring verification of complete braking system repair before the tug/pushback could return to service. *Id.* at 366-70. Viewing the record in the light most favorable to Afoa, it is evident that reasonable minds could reach different conclusions on the question of the Port's control. There is thus a genuine factual issue best resolved in the trial court. We affirm the Court of Appeals' reversal of summary judgment on this issue.

III. The Port may have had a common law duty to maintain safe common work areas, and there are triable issues of fact on this issue precluding summary judgment.

Under our common law safe workplace doctrine, landowners and general contractors that retain control over a work site have a duty to maintain safe common work areas. *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 331-32, 582 P.2d 500 (1978); *Kamla*, 147 Wn.2d at 121-22.

The Port makes a novel argument that it need not comply with this rule

because it is merely a licensor, not a general contractor. We reject the Port's argument, looking beyond mere labels and considering the principles and policies that underlie our doctrine. We hold that the Port may have had a duty to maintain safe common work areas and that the existence of this duty depends on factual issues best resolved at trial; accordingly, we affirm the Court of Appeals' reversal of summary judgment.

A. Landowners and general contractors that retain control over workplace safety have a common law duty to keep common work areas safe for all workers.

Historically, our common law workplace safety doctrine has its roots in the master-servant relationship. At common law, a "master" has a duty to its "servants" to maintain a reasonably safe place to work. *Myers v. Little Church by the Side of the Road*, 37 Wn.2d 897, 901-02, 227 P.2d 165 (1951) (citing *Nordstrom v. Spokane & Inland Empire R.R.*, 55 Wash. 521, 104 P. 809 (1909)).

Over time, we have expanded the doctrine beyond the narrow confines of the master-servant relationship.

Our seminal case in this area is *Kelley*, 90 Wn.2d at 323, a unanimous opinion authored by Justice Horowitz that elevates concern for worker safety over rigid adherence to formalistic labels and emphasizes this court's central role in ensuring the safety of our state's workers.

The facts of *Kelley* are straightforward. Defendant Howard S. Wright

Construction was a general contractor hired to build the Bank of California Center in Seattle. *Id.* at 326. Wright contracted with H.H. Robertson to install metal decking on the building, and H.H. Robertson hired the plaintiff, Edward Kelley. *Id.* Kelley was severely injured when he fell from a slippery beam 36 feet above the ground while laying decking panel on a rainy day. *Id.* Wright had not installed a safety net or required workers to use safety lines. *Id.* Kelley sued Wright, alleging Wright violated its duty to maintain a safe workplace. *Id.* at 327. Wright, much like the Port here, argued that it had no duty to provide a safe workplace for Kelley because it was not his employer, i.e., there was no master-servant relationship. *Id.* at 329.

Wright's argument relied on the so-called "independent contractor rule." An independent contractor is a person who "'contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking.'" *Kamla*, 147 Wn.2d at 119 (quoting Restatement (Second) of Agency § 2(3) (1958)). At common law, a principal who hires an independent contractor is not liable for harm resulting from the contractor's work. *Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 274, 277, 635 P.2d 426 (1981). In particular, the principal has no duty to maintain a safe workplace for a contractor's employees and is not liable for their injuries. *Id.*

In essence, Wright asked us to limit the safe workplace duty to an

employer's direct employees and not extend it to independent contractors and other workers on the work site.

We refused to so limit the doctrine. Instead, we imposed a safe workplace duty irrespective of the precise contractual relationship between the parties. *Kelley*, 90 Wn.2d at 330. We held that where a principal retains control over "some part of the work," we disregard the "independent contractor" designation and require the principal (in *Kelley*, a general contractor) to maintain safe common workplaces for all workers on the site. *Id.* Fundamentally, we reasoned that the safe workplace duty cannot be avoided by reference to formalistic labels such as "independent contractor" and that the duty must be imposed on the entity best able to prevent harm to workers. *Id.* at 331-32 (citing *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 549 P.2d 483 (1976)). We held that the relevant inquiry is whether the principal retained control over the work site, not whether there was a direct employment relationship between the parties. *Id.*

We clarified the scope of *Kelley* when we analyzed its potential application to a jobsite owner that was not a general contractor in *Kamla*. 147 Wn.2d at 119-20. We strongly suggested that the doctrine is not strictly limited to general contractors on a construction site. *Id.* *Kamla* involved a jobsite owner, the Space Needle, hiring an independent contractor to install a fireworks display on the Space Needle. We held that if a jobsite owner like the

Space Needle retained the right to control work, it could be liable under a common law safe workplace theory. *Id.* However, we also held that the Space Needle had not retained sufficient control to give rise to a common law safe workplace duty.[2] *Id.* at 121-22.

In short, the existence of a safe workplace duty depends on retained control over work, not on labels or contractual designations such as "independent contractor" or "general contractor."

B. The Port cannot avoid our safe workplace doctrine by referring to formalistic labels. The Port had a duty to maintain safe common areas if it retained control over the manner and instrumentalities of work done by EAGLE and Afoa.

The Port presents a novel argument that our well-established principles of workplace safety should not apply to it. The Port has structured its contracts with workers like EAGLE and Afoa such that those workers are not technically Port employees. Rather, the Port issues licenses to many of the independent contractors working at Sea-Tac Airport, granting them permission to work on the premises and requiring them to comply with all of the Port's safety rules and regulations. The Port argues that the *Kelley* doctrine applies only to general contractors, whereas the Port is a licensor. The Port makes this argument notwithstanding the fact that, if everything Afoa alleges is true, as we

[2] In a similar decision issued shortly after *Kamla*, the Court of Appeals held that the Space Needle *had* retained sufficient control over a different contractor such that the Space Needle had a duty to maintain a safe workplace. *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 85 P.3d 918 (2004). *Kinney* is an application of the rule set forth in *Kamla*.

must assume on a summary judgment motion, the Port appears to exercise nearly plenary control over Sea-Tac Airport and the manner in which work is performed on the premises.

While the Port's argument is admittedly novel, it is unpersuasive in light of *Kelley* and *Kamla*. *Kelley* does not limit its application to a narrow variant of the employment relation. It does not require a "master" or "servant," an "employer" or "employee," or indeed any specific combination of contractual relationships. *See Kelley*, 90 Wn.2d at 330-31. Instead, *Kelley* and *Kamla* stand for the proposition that when an entity (whether a general contractor or a jobsite owner) retains control over the manner in which work is done on a work site, that entity has a duty to keep common work areas safe because it is best able to prevent harm to workers. *See id*. at 330-31*; Kamla*, 147 Wn.2d at 119-21.

Calling the relationship a license does not change reality. If a jury accepts Afoa's allegations, the Port controls the manner in which work is performed at Sea-Tac Airport, controls the instrumentalities of work, and controls workplace safety. The Port is the only entity with sufficient supervisory and coordinating authority to ensure safety in this complex multiemployer work site. If the Port does not keep Sea-Tac Airport safe for workers, it is difficult to imagine who will. The Port cannot absolve itself of its responsibility under the law simply by declining to "hire" contractors and instead issuing them licenses.

Indeed, as *Kelley* makes abundantly clear, the safety of workers does not depend on the formalities of contract language. Instead, our doctrine seeks to place the safety burden on the entity in the best position to ensure a safe working environment. *Kelley*, 90 Wn.2d at 331. Where there are multiple employers performing a variety of tasks in a complex working environment, it is essential that a safe workplace duty be placed on a landlord who retains the right to control the movements of all workers on the site to ensure safety. *Id.* The policy of encouraging a safe workplace is even more urgent in a complex, modern, multiemployer work site like Sea-Tac Airport than in a simpler, more traditional master-servant arrangement.

We should also encourage employers to implement safeguards against injury. *See Stute*, 114 Wn.2d at 461. We achieve this laudable goal by placing a safe workplace duty on the entity best able to protect workers.

While there are many compelling policy reasons for holding the Port liable, the Port's only defense to liability is its insistence that contractual formalities must trump workplace safety. Indeed, there is little to the Port's argument beyond the assertion that a license is different from a subcontract. The Port cannot contend that it lacks contractual privity with EAGLE because it contracts directly with EAGLE when it issues licenses. The Port is also mistaken that it does not benefit by EAGLE's services. Without someone to load and unload airplanes, the airport would be pointless. [3]

[3] The dissent argues a variation of the Port's basic premise, stating repeatedly that

In *Kelley*, we rejected an inflexible approach as inconsistent with the policy behind our workplace safety law. An inflexible approach is also inconsistent with the nature and purpose of the common law. The common law owes its glory to its ability to cope with new situations, and its principles are not mere printed fiats but living tools to be used in solving emergent problems. *Mills v. Orcas Power & Light Co.*, 56 Wn.2d 807, 819, 355 P.2d 781 (1960).

A more sensible approach is that taken by the Supreme Court of Alaska. In *Parker Drilling Co. v. O'Neill*, 674 P.2d 770, 776 (Alaska 1983), Alaska emphatically rejected any notion that the duty to maintain a safe workplace depends on any particular contractual relationship or label:

> [T]here is a common law duty to provide a safe worksite running to whomever supplies and controls that worksite. This duty protects all workers on the site and not just the employees of the defendant. The duty is not dependent upon the existence of any particular combination of contractual relationships.

Very few jurisdictions take a contrary approach, and those that do have not considered the question in much detail.[4]

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only a general contractor or direct employer undertakes the duty of providing a safe workplace. Dissent at 4, 5, 7, 8, 9, 10-11, 12-13. We respectfully disagree because a landowner such as the Port can undertake to control a multiemployer workplace as effectively as, or even more effectively than, a general contractor. We decline to insulate such a landowner on the ground that the right of control is incorporated in a "license" rather than a subcontract.

[4] Other than Alaska, no court has addressed this question squarely. A California appeals court stated that the duty to provide a safe workplace only extends to the worker's "immediate employer or those who contract for the services of the immediate employer . . . ." *Lopez v. Univ. Partners*, 54 Cal. App. 4th 1117, 1126, 63 Cal. Rptr. 2d 359 (1997); *see also Waste Mgmt. Inc. v. Superior Court*, 119 Cal. App. 4th 105, 110, 13 Cal. Rptr. 3d 910 (2004) (citing *Lopez* for same). But the California court's statement was dicta because the court resolved the issue on factual grounds,

Although we find the Alaska approach attractive, we decline to adopt it wholesale, instead resolving this case on its facts. Certainly, not every licensor or jobsite owner takes on a common law duty to maintain a safe workplace anytime it requires on-site workers to comply with safety rules and regulations. But where a licensor undertakes to control worker safety in a large, complex work site like Sea-Tac Airport and is in the best position to control safety, there is a duty to maintain safe common work areas within the scope of retained control. We recognize that many aspects of this case are unique; the Port operates a highly complex multiemployer work site and is perhaps the only entity in a position to maintain worker safety. Moreover, the Port has allegedly retained substantial control over the manner in which work is done at Sea-Tac Airport. To the extent other cases arise in the future, liability should depend on similar factors. This narrow holding limits concerns raised by amici that adhering to *Kelley* raises the specter of unintended liability for municipal corporations and other licensors.

But this holding also recognizes what is fair: that a jobsite owner who exercises pervasive control over a work site should keep that work site safe for

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finding that there was no retained control whatsoever. *See Lopez*, 54 Cal. App. 4th at 1126. Likewise, Louisiana and Vermont have held that, where there is no employment relation, the only duty a landowner owes comes from the law of premises liability, even if the landowner retains some control over safety or work being done on the premises. *Boycher v. Livingston Parish Sch. Bd.*, 96-2766 (La. App. Cir. 1 6/24/98); 716 So. 2d 187, 190-91; *Vella v. Hartford Vt. Acquisitions, Inc.*, 2003 VT 108, 176 Vt. 151, 157, 838 A.2d 126, 131-32 (2003). We already rejected this narrow view of workplace safety in *Kelley*. None of these cases is precisely on point, nor do they contain thorough discussions of the relevant issue.

all workers, just as a general contractor is required to keep a construction site safe under *Kelley*, and just as a master is required to provide a safe workplace for its servants at common law.

C. If the facts Afoa alleges are true, the Port retained control over workplace safety at Sea-Tac Airport and has a common law duty to keep the workplace safe. Accordingly, summary judgment was inappropriate.

The parties dispute how much control the Port retained over the work done at Sea-Tac Airport. Afoa alleges that the Port retains control over the "Airfield Area," and that any activity there is "subject at all times to the exclusive control and management by the Port." CP at 274. At oral argument, the Port's attorney conceded that the purpose of the Port's rules and regulations is to control the tarmac. Afoa also alleges the Port retains control through its license agreement with EAGLE, requiring EAGLE to abide by all Port rules and regulations and allowing the Port to inspect EAGLE's work. Finally, Afoa alleges the Port retains control over EAGLE by conduct. He specifically claims that the Port continuously controls the actions of EAGLE and its employees and that they are subject at all times to the Port's pervasive and overriding supervision and control.

Viewing this evidence in the light most favorable to Afoa, a reasonable jury could conclude that the Port had sufficiently pervasive control over EAGLE and Afoa to create a duty to maintain a safe workplace. Therefore, summary judgment was inappropriate, and we affirm the Court of Appeals' reversal of

summary judgment on this issue.

CONCLUSION

Afoa has three potentially viable claims, each of which depends on disputed facts. The Port is wrong that the duty to keep the workplace safe depends on the formalities of contract language. To the contrary, both WISHA and our common law reject reliance on formalistic labels and place the responsibility of protecting our state's workers on the entity best able to ensure workplace safety. We affirm the Court of Appeals and remand for proceedings consistent with this opinion.

AUTHOR:
Justice Charles K. Wiggins

WE CONCUR:

Justice Debra L. Stephens

Justice Susan Owens

Justice Steven C. González

Justice Mary E. Fairhurst

Jill M. Johanson, Justice Pro Tem.